BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re:	)	
	)	Docket No. 2004-316-C
Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law	)	

BELLSOUTH'S BRIEF ON THE GEORGIA COURT ORDER AND TRENDS IN DECISIONS BY OTHER STATE COMMISSIONS

In accordance with the Order the Public Service Commission of South Carolina ("Commission") entered in this docket on April 8, 2005, BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Brief addressing: (1) the impact of the ruling of the United States District Court for the Northern District of Georgia ("the Court's Order")[1] in favor of a preliminary injunction against enforcement of the Georgia PSC's Order addressing the "new adds" provisions of the Federal Communications Commission's ("FCC's") *Triennial Review Remand Order* ("*TRRO*"); and (2) how the Commission should interpret the trend of rulings on this issue from other states and the analyses used.[2] As explained below, BellSouth's positions in this docket are consistent with the Court's Order, while the positions of the CLECs and the Office of Regulatory Staff ("ORS") are inconsistent with the Court's Order. Further, BellSouth's positions in this docket are consistent with the conclusions of a significant majority of state

[1] *See* Order, *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services,* No. 1:05-CV-0674-CC (April 5, 2005) (attached as Exhibit A to BellSouth's letter dated April 6, 2005).

[2] By separate cover, BellSouth also is filing a revised Proposed Order in redline form for the Commission's consideration.

Commissions that have decided this issue, while the positions of the CLECs and the ORS are inconsistent with such decisions. Finally, BellSouth has signed commercial agreements with more than 100 CLECs (including Access Integrated Networks, Birch Telecom of the South, Budget Phone, and AT&T), and well over a half million access lines are covered by these commercial agreements.

I. BELLSOUTH'S POSITIONS IN THIS DOCKET ARE CONSISTENT WITH THE COURT'S ORDER, AND THE POSITIONS OF THE CLECS AND THE ORS ARE INCONSISTENT WITH THE COURT'S ORDER.

By Order dated April 5, 2005, the United States District Court for the Northern District of Georgia entered a preliminary injunction against the Georgia Commission's Order. Specifically, the Court's Order "preliminarily enjoins the Georgia Public Service Commission and the other defendants from seeking to enforce the [Georgia] PSC Order to the extent that order requires BellSouth to process new UNE orders for switching and, in the circumstances described above, for loops and transport."[3] The Court explained that this ruling was required because:

(1) BellSouth has a "high likelihood of success in showing that, contrary to the conclusion of the [Georgia] PSC, the [*TRRO*] does not permit new UNE orders of the facilities at issue,"[4]

(2) BellSouth demonstrated "that it is currently suffering significant irreparable injury as a result of the [Georgia] PSC's decision,"[5]

(3) BellSouth's "injury outweighs the injury that will be suffered by" competitors seeking to continue adding new UNEs after the effective date of the *TRRO*;[6] and

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[3] *See* Order at 9-10. The Court said that "to the extent that a competitor has a good faith belief that it is entitled to order loops or transport [as a UNE], BellSouth will provision that order and dispute it later through appropriate channels." *Id.* at 2.

[4] *Id.* at 2.

[5] *Id.* at 6;

[6] *Id.* at 7

(4) BellSouth's position "is consistent with and will advance the public interest, as authoritatively determined by the FCC."[7]

The Court also found that "BellSouth's position is consistent with the conclusions of a significant majority of state commissions that have decided this issue . . . and with what the Court is likely to conclude is the most reasonable interpretation of the FCC's decision."[8]

Many of the statements in the Court's Order are consistent with the arguments BellSouth set forth in the Brief it filed in this docket and during oral argument in this docket. The Court, for example, said that "the language of the [*TRRO*] repeatedly indicates that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs."[9] The Court also found that the CLECs' reliance on paragraph 233 of the *TRRO* was misplaced, explaining that this paragraph:

> states that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." In conflict with that language, the PSC's reading of the FCC's order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see e.g., Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change-of-law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, *see id* ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id.* In sum, the Court believes that there is a significant likelihood that it will agree with the conclusion of the New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that [UNE Platform] obligations for new customers are eliminated as of March 11, 2005." *New York Order* at 13, 26. Any result other than precluding new UNE Platform customers on March 11 would "run contrary to the express directive …that no new

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[7] *Id.* at 9.

[8] *Id.* at 2-3 (emphasis added). Section II of this brief summarizes these state Commission decisions.

[9] *Id.* at 3.

> [UNE Platform] customer be added" and thus result in a self-contradictory order.[10]

Like the CLECs (and the ORS) who argued before this Commission, the Georgia PSC relied heavily on the *Mobile Sierra* doctrine in erroneously ruling that the "no new adds" provisions of the *TRRO* are not self-effectuating. The Court found that reliance on the *Mobile Sierra* doctrine was unnecessary, explaining that:

> the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements. *See* PSC Order at 3. The Court concludes that it is likely to find that the FCC did that here. The Court further notes that it would be particularly appropriate for the FCC to take that action because it was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *see also USTA v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004) (highlighting the FCC's "failure, after eight years, to develop lawful unbundling rules, and [its] apparent unwillingness to adhere to prior judicial rulings"). In any event, any challenge to the FCC's authority to bar new UNE-Platform orders must be pursued on direct review of the FCC's order, not before this Court.[11]

In any event, and irrespective of whether it was actually necessary to rely on the *Mobile Sierra* doctrine, the Court's Order makes it clear that, contrary to the CLECs' arguments and the Georgia PSC's findings, the FCC did in fact make significant public policy findings that support its decision to make the "no new adds" provisions of the *TRRO* self-effectuating:

> the FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest. The FCC explained that its prior, overbroad unbundling rules had "frustrate[d] sustainable, facilities-based competition," *Order on Remand* ¶2, that its new rules would "best allow[] for innovation and sustainable competition," *id.*, and that it would be

[10] *Id.* at 4-5 (emphasis added).

[11] *Id.* at 5-6.

> "contrary to the public interest" to delay the effectiveness of the *Order on Remand* for even a "short period of time," *id.* ¶236. The FCC further concluded that immediate implementation of the *Order on Remand* is necessary to avoid "industry disruption arising from the delayed applicability of newly adopted rules." *Order on Remand* ¶236 Unless and until a federal court of appeals overturns the FCC *Order on Remand* on direct review, the FCC's judgment establishes the relevant public-interest policy here.[12]

Finally, the Court found that the harm to BellSouth in ignoring the FCC's plain "no new adds" directive exceeds any harm the CLECs may claim to suffer from being unable to continue ordering UNEs to which they simply are not entitled:

> BellSouth has demonstrated that it is currently suffering significant irreparable injury as a result of the PSC's decision . . . [because] it is currently losing retail customers and accompanying goodwill.
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> BellSouth's injury outweighs the injury that will be suffered by the [CLECs]. The Court concludes that, although some competitive LECs may suffer harm in the short-term as a result of this decision, they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy . . . . Thus, although defendants are free to compete in many other ways, their interest in continuing practices that the FCC has condemned as anticompetitive are entitled to little, if any, weight, and do not outweigh BellSouth's injury . . . . Moreover, the Court notes that competitive LECs have been on notice at least since the FCC's August 2004 *Interim Order* that soon they might well not be able to place new orders for these UNEs.[13]

Clearly, BellSouth's positions in this docket are entirely consistent with the Court's Order and the CLECs' positions in this docket are entirely inconsistent with the Court's Order.

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12 *Id.* at 9.

13 *Id.* at 6-7; 7-8.

II. BELLSOUTH'S POSITIONS IN THIS DOCKET ARE CONSISTENT WITH THE CONCLUSIONS OF A SIGNIFICANT MAJORITY OF STATE COMMISSIONS THAT HAVE DECIDED THIS ISSUE.

As the Court's Order says, "BellSouth's position is consistent with the conclusions of a significant majority of state commissions that have decided this issue . . . ."[14] To the best of BellSouth's knowledge, at least sixteen (16) state Commissions have made decisions that are consistent with BellSouth's positions, while only four (4) have made decisions that are inconsistent with BellSouth's positions.[15] The following is a summary of each of the state Commission decisions of which BellSouth is aware.

A. Summary of Sixteen (16) State Commission Orders That Are Consistent With BellSouth's Position.

1. California

The California Commission ruled that "Verizon has no obligation to process CLEC orders for UNE-P to serve new customers" and that "if parties have not reached an agreement on the necessary amendments for new arrangements to serve new orders placed by existing CLEC customers, Verizon shall continue processing CLEC orders for UNE-Ps (for these existing customers) until no later than May 1, 2005."[16] In reaching this decision, the California Commission said "it is clear that the FCC desires an end to the UNE-P,"[17] and that

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[14] *See* Order, *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services,* No. 1:05-CV-0674-CC at 2 (April 5, 2005).

[15] This figure of four (4) inconsistent orders does not include the Order of the Georgia PSC which, as explained above, is the subject of the preliminary injunction entered by the United States District Court for the Northern District of Georgia.

[16] *See* Commissioner Peevey's Order of March 11, 2005 Order at p. 12 (attached as Exhibit A to BellSouth's letter of March 25, 2005)(emphasis added). *See also* Commissioner Kennedy's Order of March 11, 2005 at pp. 14-15 (attached as Exhibit B to BellSouth's letter of March 25, 2005)..

[17] Peevy Order at 7. *See also* Kennedy Order at 8.

> The FCC's concerns over the disruption to service caused by the withdrawal of UNE-P are focused on those customers undergoing a transition away from UNE-P. This statement does not indicate that the FCC believes that the failure to provide new UNE-P services to still more customers would be disruptive. Indeed, common sense indicates that it would be more disruptive to provide a service to a new customer that would only be withdrawn in 12 months than to refrain from providing such a service that will be discontinued.[18]

2. Delaware

A CLEC petitioned the Delaware commission for an order requiring Verizon to continue to accept and process "new add orders" beyond the effective date of the *TRRO* and to negotiate the "no new adds" provisions of the *TRRO* through the change of law process.[19] During a March 22, 2005 hearing, the Delaware commission denied this Petition.[20]

3. Florida

With regard to local circuit switching, the Florida Commission decided that after March 11, 2005, CLECs may not obtain "new adds" as UNEs.[21] With regard to loops and transport facilities, the Florida Commission decided that the requesting CLEC will certify that its order for loops and/or transport should be treated as a UNE under the *TRRO* criterion, and BellSouth will either provision the order or it will dispute the provisioning pursuant to the parties' existing dispute resolution process, the process proposed by BellSouth.[22]

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[18] Peevy Order at p. 8 (emphasis added). *See also* Kennedy Order at pp. 9-10.

[19] *See* Transcript of March 22, 2005 Proceeding before the Delaware Commission at p. 0003 (attached as Exhibit A to this Brief).

[20] *Id.* at pp. 0032-0033.

[21] Florida Vote Sheet dated April 5, 2005 at p. 2 (attached as Exhibit B to this Brief).

[22] *Id.*

4. Indiana

The Indiana Commission has found that "SBC Indiana, pursuant to the clear FCC directives in the *TRRO*, is not required to accept UNE-P orders for new customers after March 10, 2005."[23] In reaching that decision, the Indiana Commission said that

> the FCC is clear in its intent to eliminate UNE-P. It is also clear that the FCC intends to eliminate UNE-P from its existing requirement to be unbundled pursuant to section 251 of the Act. . . . If mass market circuit switching is no longer an element required to be unbundled pursuant to sections 251/252 of the Act, it can therefore no longer be required to be unbundled within the context of an interconnection agreement for the stated purposes of sections 251/252.[24]

The Indiana Commission found "the FCC's language of the *TRRO* and accompanying rules unambiguous as to the intent that access to UNE-P for new customers not be required after March 10, 2005."[25] It concluded that "as of March 11, 2005, ILECs are not required, pursuant to section 251 of the Act, to accept new UNE-P orders for new customers," and that "as of March 11, 2006, all UNE-P customers in existence and all customer orders pending for such service as of March 10, 2005, must be transitioned off of UNE-P."[26]

The Indiana Commission rejected the CLECs' contention that the "no new adds" provisions of the *TRRO* had to be negotiated through the change of law process," stating

> we cannot reasonably conclude that the specific provision of the *TRRO* to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach the conclusion proposed by the Joint CLECs would confound the FCC's

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[23] Indiana Order dated March 9, 2005 at p. 9 (which was attached as Exhibit B to BellSouth's letter of March 9, 2005).

[24] *Id.* at 6 (emphasis added).

[25] *Id.*

[26] *Id.* at pp. 6-7.

> clear direction provided in the *TRRO*, with no obvious way to return to the transition timetable established in the *TRRO*.
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> [T]he FCC is clear that, barring mutual agreement by the parties, UNE-P will no longer be available to new customers after March 10, 2005. This clear FCC directive leaves little room for the interpretation advocated by the Joint CLECs.
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> [W]e cannot ignore the requirements of the changed law itself. The *TRRO* sets forth a default arrangement for the elimination of UNE-P. Unless and until the parties mutually agree to adopt an alternative arrangement instead of the default provisions of the *TRRO*, we must look to the FCC's directives in the *TRRO* for the elimination of UNE-P for new customers.[27]

With regard to loops, transport, and dark fiber, the Indiana Commission issued a separate Order stating that:

> as of March 11, 2005, SBC Indiana should not deny a request by NuVox for unbundled access to high-capacity loops or dedicated transport based on a SBC determination that access is not required at the relevant wire center(s). Both SBC Indiana and NuVox should follow the provisioning procedures set forth in ¶234 of the *TRRO*. This interim ruling . . . will be further addressed in a final ruling.[28]

5. Kansas

The Kansas Commission found that "the FCC is clear in that as of March 11, 2005, the mass market local circuit switching and certain high-capacity loops are no longer available to CLECs on an unbundled basis for new customers."[29] The Kansas Commission explained that "[i]t does not make sense to delay implementation of these

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[27] *Id.* at 7-8 (emphasis added).

[28] Indiana Order dated March 10, 2005 at p. 2 (attached as Exhibit C to BellSouth's letter of March 15, 2005).

[29] Kansas Order dated March 10, 2005 at pp. 4-5 (attached as Exhibit D to BellSouth's letter of March 15, 2005).

provisions by permitting an interconnection scheme contrary to the FCC's rulings to persist"[30] and that "any harm claimed by the CLECs to be irreparable today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's new rules."[31] Finally, the Kansas Commission said that "the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated."[32]

6. Maine

The Maine Commission found that "the FCC intended that its new rules de-listing certain UNEs be implemented immediately rather than be the subject of interconnection agreement amendment negotiations before becoming effective,"[33] noting that "[t]he decisions set forth in the *TRRO* come after years of seemingly endless litigation involving the FCC and federal courts; delaying the implementation of the new rules will only delay the inevitable."[34] The Maine Commission also said that "[a]s a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC; the FCC has been clear that these UNEs are no longer required to be unbundled under section 251."[35]

The Maine Commission also expressly considered – and rejected – the reasoning of the Georgia Commission in its Order that was subsequently enjoined by the federal court in Georgia:

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30 *Id.* at p. 5 (emphasis added).

31 *Id* (emphasis added).

32 *Id.*

33 Maine Order dated March 17, 2005 at p. 4 (attached as Exhibit C to BellSouth's letter of March 25, 2005).

34 *Id.*

35 *Id.* (emphasis added).

> In addition, we reject the reasoning of the Georgia Public Service Commission in its March 8, 2005 Order (Docket No. 19341-U) regarding the applicability of the *Mobile Sierra* doctrine because the contracts at issue here contain change of law provisions and therefore already contemplate regulatory changes. Further, the Georgia PSC seems to be saying that, without a showing of heightened public interest, the FCC cannot unilaterally override an interconnection agreement but can, without a showing of heightened public interest, order parties to amend their agreement to be consistent with the FCC's new rules. We do not find this distinction persuasive.
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> Finally, as Verizon correctly noted, the FCC stated repeatedly throughout its Order that ILECs would have no obligation to provide CLECs with access to the delisted UNEs and that the transition plan does not permit CLECs to add new de-listed UNEs. We find the FCC's specificity regarding these issues to be clear and thus, we do not believe it to be appropriate or necessary to ascribe anything but their plain meaning to the FCC's directives. Accordingly, we deny the requests of MCI and CLEC Coalition for an order staying implementation of the FCC's rules pending interconnection agreement negotiations.[36]

With regard to loops and transport facilities, the Maine Commission ruled that "CLECs, after a diligent inquiry, could self-certify that a particular wire center does not meet the FCC's criteria"[37] and that "upon submission of an order involving self-certification, an ILEC must provision the order first and then dispute the classification of the wire center in front of a state commission pursuant to the dispute resolution procedures of most interconnection agreements."[38]

7. Maryland

After filing an emergency petition with the Maryland Commission, MCI withdrew the petition because it had reached a commercial agreement with Verizon.[39]

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36 *Id.* at 4-5 (emphasis added).

37 *Id.* at 5.

38 *Id.*

39 Maryland Letter dated March 10, 2005 at 1 (attached as Exhibit F to BellSouth's letter of March 15, 2005).

Although other parties had filed petitions to intervene and comments supporting MCI's petition, the Maryland Commission denied the interventions, it declined to order Verizon to continue accepting orders for "new adds" as UNEs beyond the effective date of the *TRRO*, and it said that if any parties that had attempted to intervene "believe that their specific interconnection agreements, or the *Triennial Review Remand Order* itself, do not support any proposed action of Verizon, [they] may file individualized petitions based upon their particular interconnection agreements and specific provisions of the *Triennial Review Remand Order* for the Commission's consideration."[40]

8. Massachusetts

CLECs in Massachusetts filed a Petition for Emergency Declaratory Relief seeking a ruling that Verizon must continue accepting "new adds" as UNEs after the effective date of the *TRRO*. The Commission did not grant emergency relief, but instead established a briefing schedule calling for Initial briefs on April 1, 2005 and Reply briefs on April 15, 2005.[41]

9. Michigan

After issuing preliminary orders,[42] the Michigan Commission has found that "[r]equiring the continued provision of UNE-P would be inconsistent with the FCC's detailed findings and plan for transition in the *TRO* and *TRRO*,"[43] and it has "affirmatively [found] that the CLECs no longer have a right under Section 251(c)(3) to

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40 *Id.* at p. 2.

41 Massachusetts Memo dated March 10, 2005 at p. 2 (attached as Exhibit G to BellSouth's letter of March 15, 2005).

42 *See* Michigan Order dated February 28, 2005 (attached as Exhibit A to BellSouth's March 9, 2005 letter); Michigan Order dated March 9, 2005 (attached as Exhibit H to BellSouth's March 15, 2005 letter).

43 Michigan Order dated March 29, 2005 at p. 8 (attached as Exhibit C to this Brief).

order UNE-P and other UNEs that have been removed from the list that must be offered to serve new customers."[44]

10. New Jersey

After "carefully consider[ing] the express language of the *TRRO* and the FCC's new regulations," the New Jersey Commission entered an Order concluding that "that it is not empowered to require [Verizon] to continue providing new discontinued UNE arrangements after March 11, 2005."[45] Addressing the "consistent with our conclusions in this Order" language in paragraph 233 of the *TRRO*, the New Jersey Commission said "one such 'conclusion,' clearly stated in the *TRRO*, is that there is no longer any legal basis under §251 of the Act for requiring ILECs to unbundle certain network elements."[46] It further noted that existing interconnection agreements

> are codifications of federal requirements imposed by §251 of the Telecommunications Act as part of an interconnection and unbundling framework. Their primary purpose is to implement that framework. Pursuant to that very same framework, the FCC has now determined that there no longer exists any legal basis for certain UNEs and UNE combinations. Thus, it is not reasonable to construe the *TRRO* as allowing the terms of a pre-existing interconnection agreement to trump, *per se*, the express unbundling requirements set forth in the *TRRO* and the FCC's regulations.[47]

The New Jersey Commission, therefore, concluded that "[f]orcing Verizon to process new orders for discontinued UNEs after March 11, 2005 would violate the *TRRO* and the FCC's new unbundling regulations."[48]

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44 *Id.* at 9.

45 New Jersey Order dated March 24, 2005 at p. 4 (attached as Exhibit D to this Brief).

46 *Id.* at 4.

47 *Id.* at 6.

48 *Id.*

11. New York

The New York Commission concluded, "based on our careful review of the *TRRO*," that

> the FCC does not intend that new UNE-P customers can be added during the transition period as the *TRRO* "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to Section 251(c)(3)." *TRRO* ¶ 227. Although *TRRO* ¶233 refers to interconnection agreements as the vehicle for implementing the *TRRO*, had the FCC intended to use this process for new customers, we believe it would have done so more clearly. Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005. Providing a true-up for new UNE-P customers would run contrary to the express directive in *TRRO* ¶227 that no new UNE-P customers be added.[49]

While the New York Commission found that "the change of law provision in those agreements should be followed to incorporate the transition pricing on delisted elements for the embedded base," it said that "[b]ecause the terms of the transition are clearly specified in the *TRRO*, this process should not be complex."[50] It also found that "to be consistent with the *TRRO*, the amendment should provide for a true-up to the *TRRO* transition rate for the embedded base of customers back to March 11, 2005, the effective date of the *TRRO*."[51]

With regard to loops and transport facilities, the New York Commission found that "[a] CLEC will not be considered to have performed its due diligence if it submits an order for a wire center that is on the Commission approved tariff list of exempt wire

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[49] New York Order dated March 16, 2005 at pp. 25-26 (attached as Exhibit E to BellSouth's March 25, 2005 letter)(emphasis added).

[50] *Id* .at 25.

[51] *Id.*

centers," and thus it decided not to require Verizon "to process orders that clearly conflict with the approved tariff list of exempt wire centers."[52]

12. Ohio

The Ohio Commission ruled that CLECs may not order "new adds" as UNEs in order to serve new customers after the effective date of the *TRRO*, explaining that "[t]he FCC very clearly determined that, effective March 11, 2005, the ILECs' unbundling obligations with regard to mass market local circuit switching, certain high-capacity loops, and certain dedicated interoffice transport would no longer apply to serve new customers."[53] With regard to the embedded customer base as of March 11, 2005, the Ohio Commission said:

> in order to afford the parties additional time to negotiate the applicable interconnection agreement amendments necessary to transition the CLECs embedded customer base as contemplated by the *TRRO*, SBC Ohio is directed to continue processing CLEC orders for the embedded base of unbundled local circuit switching used to serve mass market customers until no later than May 1, 2005. Accordingly, SBC Ohio is directed to not unilaterally impose those provisions of the accessible letters that involve the embedded customer base until the company has negotiated and executed the applicable interconnection agreements with the involved CLECs.[54]

13. Pennsylvania

A coalition of CLECs petitioned the Pennsylvania commission for an emergency order requiring Verizon to continue provisioning "new adds" as UNEs after the March 11, 2005 effective date of the *TRRO*. The Pennsylvania commission held that "Verizon must continue to process orders for the existing base of CLEC customers" through May

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52 *Id.* at 10.

53 Ohio Order dated March 9, 2005 at p. 3 (attached as Exhibit C to BellSouth's letter of March 9, 2005).

54 *Id.* at p. 4.

16, 2005.[55] The commission, however, clearly said that Verizon is not required to continue processing "new adds" with regard to new CLEC customers:

> The FCC has declared a "nationwide bar" on unbundled switching. *TRRO*, para. 204. This bar is so emphatic that the FCC specifically declined to make a transition plan for service to new customers (versus new service arrangements to existing customers). *Id*. at para. 227. Similar restrictions on service to new customers are required for loops and transport. *Id.* at paras. 142, 195. Therefore, Verizon is not required to continue provisioning discontinued UNEs for service to new CLEC customers, but will be required to provision new orders to serve the embedded base of CLEC customers . . . .[56]

14. Rhode Island

At an open meeting held March 8, 2005, the Rhode Island Commission adopted Verizon's proposed tariff filing (which provided for no new adds as UNEs after the effective date of the *TRRO*) on an interim basis.[57] The tariff would be subject to further investigation to determine if the wording of the proposed tariff needs to be revised and if necessary, the CLECs would be entitled to any refund or compensation for any inappropriate rate or action by Verizon during this interim period.[58]

15. Texas

The Texas Commission issued an order adopting an interim agreement amendment that represents its preliminary determinations of the impacts of the *TRO* and

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55 Pennsylvania Order dated April 7, 2005 at p.5 (emphasis added) (attached as Exhibit E to this Brief).

56 *Id.* at 6 (emphasis added).

57 Summary of Rhode Island Commission Action on its Website (attached as Exhibit J to BellSouth's letter of March 15, 2005).

58 *Id.*

TRRO.[59] With regard to local circuit switching and UNE-P arrangements, the Texas Commission ruled that:

> After March 11, 2005, pursuant to Rule 51.319(d)(2)(iii), as set forth in the [*TRRO*], SBC shall continue to provide unbundled access to Mass Market Local Circuit Switching/UNE-P to CLEC . . . only for CLEC to serve its embedded base. "Embedded base" shall refer only to Mass Market Local Circuit Switching/UNE-P ordered by CLEC prior to March 11, 2005.[60]
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> CLEC shall not be prohibited from ordering and SBC shall provision (i) additional UNE-P access lines to serve CLECs embedded customer-base and (ii) moves and changes in UNE-P access lines to serve CLEC's embedded customer-base during the time that this Amendment is in effect.[61]

The Commission acknowledged conflicting interpretations of "embedded customer-base," and it held that until it makes a final determination on that issue, "SBC Texas shall have an obligation to provision new UNE-P lines to CLEC's embedded customer-base, including moves, changes and additions of UNE-P lines for such customer base at new physical locations."[62] It found that "[a]ny price differential for which SBC Texas may seek true-up shall be addressed in Track II or a subsequent proceeding."[63]

With regard to loops and transport facilities, the Texas Commission ruled that:

> After March 11, 2005, pursuant to Rules 51.319 (a) and (e), as set forth in the [*TRRO*], SBC Texas shall continue to provide unbundled access to the Affected Loop-Transport Element(s) to CLEC . . . only for CLEC to serve

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[59] Texas Order dated February 25, 2005 at p. 1 (attached as Exhibit D to BellSouth's letter of March 9, 2005).

[60] *Id.*, Interim Agreement Amendment at p. 5, §1.3.1 (emphasis added).

[61] *Id.* at p. 5, §1.3.2.

[62] Texas Proposed Order on Clarification at p. 1 (attached as Exhibit E to BellSouth's letter of March 9, 2005).

[63] *Id.* at 1-2.

its embedded base. "Embedded base" shall refer only to Affected Loop-Transport Element(s) ordered by CLEC prior to March 11, 2005."[64]

[U]unless the FCC approves the list of wire centers designated by SBC Texas in its February 18, 2005 filing, paragraph 234 of the *TRRO* allows CLECs to self-certify their eligibility for dedicated transport and high-capacity loops and requires ILECs to provision the UNE before submitting any dispute regarding eligibility for the UNE. However, if the FCC approves the wire centers identified by SBC Texas, the PUC clarifies its intent that the FCC's determination shall be dispositive of the disputes regarding eligibility for the UNEs.[65]

16. Virginia

The Virginia Commission dismissed and denied CLEC petitions to prevent Verizon from declining to accept orders for "new adds" after March 11, 2005.[66] The Virginia Commission based its ruling primarily on the grounds that the filings did not comply with its rules, but it also stated that:

> Furthermore, Petitioners assert that Verizon's obligations to continue the provision of certain services arise from the so-called Triennial Review Remand Order recently issued by the Federal Communications Commission ("FCC") in *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005). Thus, insofar as the matters raised by the Petition require construction of this FCC ruling, the parities may have an adequate—and more appropriate—remedy by seeking relief from that agency.[67]

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64 Texas Order dated February 25, 2005 at p. 1 (attached as Exhibit D to BellSouth's letter of March 9, 2005), Interim Agreement Amendment at p. 5, §1.2.1. (emphasis added).

65 Texas Proposed Order on Clarification at p. 2 (attached as Exhibit E to BellSouth's letter of March 9, 2005).

66 *See* Virginia Order dated March 24, 2005 (attached as Exhibit F to this Brief).

67 *Id.* at p. 2.

B. Summary of Four (4) State Commission Orders That Are Inconsistent With BellSouth's Position.

1. Illinois

The Illinois Commission ordered Illinois Bell Telephone Company ("SBC") "to continue to offer the same UNEs as required by the parties' current [interconnection agreements] until those [interconnection agreements] are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding."[68] SBC moved United States District Court for the Northern District of Illinois for a preliminary injunction of that order, and the Court denied the motion.[69]

2. Kentucky

The Kentucky Commission ruled that "BellSouth shall follow its contractual obligation to negotiate the effect of changes of law on its interconnection agreements regarding the discontinuation of unbundled network elements."[70] BellSouth has petitioned the federal Court in Kentucky for a preliminary injunction against enforcement of this Order.

3. Louisiana

Although it has not yet issued a written order, the Louisiana Commission has voted to adopt the Louisiana Staff's recommendations. Those recommendations say that "there can be no dispute that the *TRRO* has removed BellSouth's obligation to provide

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[68] See Illinois Order dated March 9, 2005 Order at 9 (attached as Exhibit B to BellSouth's letter of March 15, 2005).

[69] See Order of United States District Court for the Northern District of Illinois dated March 29, 2005 at 1 (attached as Exhibit G to this Brief).

[70] Kentucky Order dated March 10, 2005 at 3 (attached as Exhibit E to BellSouth's letter of March 25, 2005).

UNE-P pursuant to Section 251 of the Telecommunications Act."[71] Like the Georgia Commission, however, the Louisiana Staff recommendations (which the Commission adopted) say that "[w]hile Staff agrees with BellSouth the FCC has the authority to revise private contractual agreements pursuant to the *Sierra-Mobile* doctrine, Staff does not agree that it did so with regard to the provisions of the *TRRO*."[72] The Louisiana Commission, therefore adopted the Staff's recommendation to "direct the parties to implement any changes mandated by the *TRRO*, including those requiring no new adds for UNE-P, through the change of law processes contained in the interconnection agreements."[73] However, the Louisiana Commission also adopted the Staff's recommendation that "any new adds from the earlier date of an LPSC Order adopting Staff's Recommendation, or April 17, 2005, shall be subject to a true-up to an appropriate rate to be determined."[74]

4. Mississippi

In response to a petition filed by CLECs, the Mississippi Commission issued an order *sua sponte* – and before BellSouth filed its response to the CLECs' petition – that directs BellSouth "to continue accepting and provisioning CLECs orders, as provided for in the [interconnection agreements]."[75] The Order also directed BellSouth to "maintain the same pricing that is established in the [interconnection agreements]," and it says that the Mississippi Commission "will, at a later time, if necessary, direct that there be a true-

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71 Louisiana Staff's Recommendations dated March 18, 2005 at p. 4 (attached as Exhibit H to this Brief).

72 The Louisiana Staff made this recommendation and the Louisiana Commission adopted it before the federal court in Georgia issued its Order.

73 *Id.*

74 *Id.* at 5.

75 Mississippi Order dated March 9, 2005 at p. 3 (attached as Exhibit I to this Brief).

up proceeding that will determine how rates and charges will be adjusted retroactively to March 11, 2005."[76] BellSouth has petitioned the federal Court in Mississippi for a preliminary injunction against enforcement of this Order.

III. BELLSOUTH HAS ENTERED INTO COMMERCIAL AGREEMENTS WITH MORE THAN 100 CLECS, AND THESE COMMERCIAL AGREEMENTS COVER WELL OVER HALF A MILLION ACCESS LINES.

To date, BellSouth has signed commercial agreements with more than 100 CLECs (including Access Integrated Networks, Birch Telecom of the South, Budget Phone, and AT&T), and well over a half million access lines are covered by these commercial agreements.[77]

CONCLUSION

Both the Court Order and the trend of state Commission decisions support BellSouth's positions in this docket. The Commission, therefore, should deny all of the relief requested by the Joint Petitioners.

Respectfully submitted, this 11th day of April, 2005.

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76 *Id.* at 3.

77 *See* Exhibit J to this Brief.

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